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No. 04-27

In the Supreme Court of the United States

AMERICAN NATIONAL INSURANCE COMPANY, MONUMENTAL LIFE INSURANCE COMPANY, AND THE WESTERN & SOUTHERN LIFE INSURANCE COMPANY,

Petitioners,

v.

MATTIE BRATCHER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN COUNCIL OF LIFE INSURERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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The American Council of Life Insurers ("ACLI") respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari. All parties have consented to the filing of this brief. The required letters of consent have been filed with the Clerk of the Court.[1]

INTEREST OF THE *AMICUS CURIAE*

ACLI is the largest life insurance trade association in the United States. ACLI's members account for 69% of the life insurance premiums and 76% of the annuity considerations in the United States among legal reserve life insurance companies. A number of ACLI's members, including all three petitioners in this action, are defendants in putative class-action suits around the country alleging discrimination against African-Americans in the sale of small-face-amount, or "industrial," life-insurance policies. ACLI and its members are concerned that, unless reversed by this Court, the decision of the Fifth Circuit in this case will encourage the growing practice among class-action lawyers of seeking certification under Rule 23(b)(2) in order to circumvent the predominance and superiority requirements of Rule 23(b)(3).

SUMMARY OF ARGUMENT

In *Ticor Title Insurance Co.* v. *Brown*, 511 U.S. 117 (1994), this Court expressed substantial doubt that claims for monetary damages may ever be certified for class-wide adjudication under Rule 23(b)(2) of the Federal Rules of Civil Procedure, which permits class certification when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with

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[1] No counsel for any party to these proceedings authored this brief, in whole or in part. No other entity or person, aside from *amicus* ACLI, its members, and its counsel, made any monetary contribution for the preparation or submission of this brief.

respect to the class as a whole." Because this Court has not yet ruled definitively on that question, however, the lower federal courts uniformly have adhered to the suggestion of the Rules Advisory Committee that monetary damages may be sought in a (b)(2) class action so long as they are not the "exclusive[] or predominant[]" form of relief requested by the class. Fed. R. Civ. P. 23(b)(2), Advisory Committee Note. In the instant case, however, the Fifth Circuit turned this "predominance" test on its head, holding that the monetary damages sought on behalf of each of millions of putative class members did not predominate despite the district court's unassailed finding that "many" of the putative class members (Pet. App. 9a) — as many as 82% (see *id.* at 12a) — would not benefit from the injunctive relief sought, and despite the panel majority's acknowledgment that the defendants' liability for damages to each class member would depend on the "idiosyncracies" of each class member's situation (*id.* at 16a).

In so holding, the Fifth Circuit read out of the Rule 23(b)(2) analysis the express requirement that the injunctive relief sought in a (b)(2) class action must effect a remedy applicable to the class "***as a whole***." Fed. R. Civ. P. 23(b)(2) (emphasis added). By holding instead that a class may be certified under Rule 23(b)(2) so long as some non-negligible number of the class members might benefit from injunctive relief (see Pet. App. 12a), the Fifth Circuit's decision throws open the door to abuse of the (b)(2) class action by enterprising class-action lawyers who wish to seek substantial monetary recoveries without having to satisfy the stringent requirements for certifying such cases as class actions under Rule 23(b)(3). Specifically, the decision of the Fifth Circuit invites class-action lawyers to reformulate as (b)(2) class actions suits that seek predominantly monetary damages through the simple expedient of adding to their complaints little more than a *pro forma* request for injunctive or declaratory relief.

Moreover, the class-action procedure approved by the Fifth Circuit endangers the due process rights of defendants and absent plaintiffs alike by relieving plaintiffs of their burden of proving the individualized elements of their claims, by depriving defendants of their right to put on individualized defenses, and by depriving absent class members of their right to seek individual relief when monetary damages are involved, while subjecting absent class members to the risk that a defense applicable only to some of them will be applied on a class-wide basis to preclude their claims. For all of these reasons, as well for the reasons stated in the petition, the Court should grant certiorari and reverse the decision below.

ARGUMENT

I. THE FIFTH CIRCUIT'S DECISION THROWS OPEN THE DOOR TO ABUSE OF RULE 23(b)(2) CLASS ACTIONS

This Court has emphasized that it is "of overriding importance" that courts "be mindful that * * * Rule [23] as now composed sets the requirements they are bound to enforce," and that "[t]he text of a rule * * * limits judicial inventiveness." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 620 (1997). The decision of the Fifth Circuit panel majority in this case contravenes that direction by effectively "amend[ing] [Rule 23(b)(2)] outside the process Congress ordered" (*ibid.*), thereby opening the door to the certification of class actions under Rule 23(b)(2) that are alien to the plain language of the Rule, the intent of its drafters, and the decisions of this Court.

The plain language of Rule 23(b)(2) directs that a class action may be certified thereunder only when the defendant's alleged wrongdoing "mak[es] appropriate final injunctive relief or corresponding declaratory relief with respect to the class ***as a whole***" (emphasis added). Thus, even assuming that monetary relief may be sought by a (b)(2) class in some

circumstances, the plain language of the Rule makes it clear that the first step in evaluating the propriety of certifying a (b)(2) class action is to determine whether the putative class is seeking injunctive or corresponding declaratory relief that will benefit all of its members. See Fed. R. Civ. P. 23(b)(2), Advisory Committee Note (explaining that a Rule 23(b)(2) class action applies to cases in which "final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class ***as a whole***, is appropriate") (emphasis added).[2] Only if the requested injunctive or corresponding declaratory relief would benefit the class as a whole does a court need to consider the impact that a request for monetary damages should have on the propriety of certifying a class under Rule 23(b)(2).

In the instant case, however, the panel majority treated the injunctive component of a (b)(2) class action as nothing more than a readily satisfied *pro forma* requirement, thereby paving the way for the certification under Rule 23(b)(2) of classes seeking substantial, indeed predominantly, money damages. In so doing, the panel majority not only failed in its obligation to enforce Rule 23(b)(2) as written, but under-

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[2] "Declaratory relief 'corresponds' to injunctive relief if, as a practical matter, a declaratory judgment provides the same relief that an injunction would, or if the declaratory relief leads to the subsequent entry of an injunction." 5 James Wm. Moore, *Moore's Federal Practice* § 23.43[3][a], at 23-197 (3d ed. 2004). A declaration of illegality that merely leads to an award of monetary damages does not, however, satisfy the requirements of Rule 23(b)(2). See *id.*, § 23.43[3][d], at 23-202 ("[C]ourts have held that actions seeking declaratory judgments under Rule 23(b)(2) are improper if the declaration is a declaration of liability that is not designed primarily to control the conduct of the parties, but rather is designed to form the basis for one or more subsequent monetary damage awards.").

took just the sort of "judicial inventiveness" against which this Court spoke in *Amchem*. 521 U.S. at 620.

As the panel majority acknowledged, the district court denied class certification because, *inter alia*, it found that "'many' proposed class members — those whose policies have lapsed, those whose policies have already been voluntarily adjusted by defendants, and those whose death benefits already have been paid — would not benefit from injunctive relief." Pet. App. 9a. The result, the district court ruled, was that the monetary relief sought by plaintiffs on behalf of the entire class necessarily predominated over their requested injunctive relief, thereby barring certification of the proposed class under Rule 23(b)(2). See *id.* at 9a-10a.

The panel majority reversed that ruling, not because it disagreed with the district court's factual finding that many putative class members would not benefit at all from the requested injunctive relief, but because it concluded that Rule 23(b)(2) requires only that some unspecified "proportion" of the class might benefit from an injunction. Pet. App. 12a. Indeed, the panel majority held that, even if only 18% of the class would benefit from injunctive relief, "th[at] proportion is sufficient" to deem "the class ***as a whole*** * * * to be seeking injunctive relief." *Ibid.* (emphasis added). The panel majority further held that, assuming that some non-negligible "proportion" of the class members will benefit from injunctive relief, the ***entire class*** is free to seek monetary relief in a (b)(2) class action. *Ibid.* That holding, which treats the injunctive component of a (b)(2) class action as a mere formality, cannot be reconciled with the plain language of Rule 23(b)(2).

Nor can it be reconciled with this Court's recognition in *Amchem* that Rule 23(b)(3) — not Rule 23(b)(2) — was intended by the drafters of Rule 23(b) to be the vehicle for resolving on a class-wide basis "complex litigation * * * for damages" such as the instant case. 521 U.S. at 614. Because

the drafters of the Rule recognized that actions for money damages might lack "the class cohesion that legitimizes representative action in the first place" (*id.* at 623), they imposed certain preconditions on the certification of such classes. Most notably, a Rule 23(b)(3) class action can be certified only if the district court first finds that common questions "'predominate over any questions affecting only individual [class] members,'" and that class resolution is "'superior to other available methods for the fair and efficient adjudication of the controversy.'" *Id.* at 615 (quoting Fed. R. Civ. P. 23(b)(3)). By contrast, classes certified under Rule 23(b)(2) are ***presumed*** to enjoy cohesiveness and a commonality of interest, because such class actions seek to impose uniform group remedies for a uniform group injury in the form of class-wide injunctive or declaratory relief, thereby obviating the need for the additional procedural protections provided to (b)(3) classes. See Rule 23(b)(2), Advisory Committee Note (explaining that "[a]ction or inaction is directed to a class within the meaning of [Rule 23(b)(2)] * * * provided it is based on grounds which have general application to the class"); see also 5 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* §16:17, at 214 (4th ed. 2002) ("[t]he theory underlying the less stringent notice requirements" for Rule 23(b)(2) class actions "is that in Rule 23(b)(2) actions there is purportedly a higher degree of 'cohesiveness or unity in the class' than in Rule 23(b)(3) class actions") (quoting Rule 23, Advisory Committee Note, 39 F.R.D. 69, 106).

Under the panel majority's formulation of the (b)(2) analysis, the critical ingredient that imbues the (b)(2) class with the homogeneity and cohesiveness that are its defining elements — namely, wrongdoing generally applicable to the class which can be rectified through class-wide injunctive or declaratory relief — is absent. What remains is a large-scale, complex suit for money damages that should be evaluated for certification only under the more stringent predominance and superiority requirements of Rule 23(b)(3). The panel major-

ity plainly was untroubled by this result, however, declaring that "to deny certification on the basis that the damages claims would be better brought as a rule 23(b)(3) class serves no function other than to elevate form over substance." Pet. App. 14a; see also *id.* at 14a n.16 ("Rule 23(b)(2) was adopted to facilitate the use of injunctive relief, not to compartmentalize claims for damages under Rule 23(b)(3)."). To the contrary, the panel majority's holding effectively eliminates the "line" that this Court has explained was carefully drawn by the drafters of Rule 23(b) to distinguish class actions that can be certified under Rule 23(b)(1) and (b)(2) from those that can be certified only under Rule 23(b)(3). *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 864 (1999) (citing *Amchem*).

Because just about any putative class will include at least some members who continue to suffer from the allegedly unlawful behavior, the panel majority's decision, if not reversed, will encourage enterprising class-action lawyers to use a request for injunctive relief as a Trojan horse with which to smuggle in, under the more lenient standards of Rule 23(b)(2), what is in actuality a multitude of individualized claims for money damages.

Importantly, the damage done by the panel majority's decision has ramifications well beyond the Fifth Circuit and cases involving race-based premiums. As the petition indicates, the majority of the circuits that have addressed the question whether monetary relief may be recovered in a (b)(2) class action has adopted the Fifth Circuit's test for evaluating whether the monetary relief sought by the putative (b)(2) class predominates over the injunctive relief requested. See Pet. 15. Accordingly, the panel majority's (b)(2) analysis potentially could become the dominant approach to determining the circumstances under which a district court may certify a (b)(2) class seeking substantial monetary relief. This would further aggravate the already extant split among

the circuits as to when, if ever, monetary relief may be sought by a (b)(2) class. See Pet. 14-20.

Several recently-filed suits confirm that this is no mere hypothetical concern: The floodgates having been opened, class-action lawyers already have begun routinely characterizing money damage claims as ones for "restitution," "disgorgement," "unjust enrichment," or "constructive trust," and adding on a claim for injunctive relief for good measure, in the hope of obtaining under the guise of Rule 23(b)(2) what they could not hope to obtain under Rule 23(b)(3) — certification of an expansive class and with it the prospect of a lucrative settlement.

1. *Central Alabama Comprehensive Healthcare, Inc.* v. *Aventis Pharmaceutical, Inc.*, No. 3:04CV673-B (M.D. Ala.) (filed July 13, 2004). Plaintiff seeks certification of a nationwide class of community health centers, public hospitals, and other entities that provide prescription drugs to the needy. Plaintiff alleges that the nine named defendants — each a major manufacturer of pharmaceuticals — charged the members of the putative class prices that were not discounted in the manner required by Section 340B of the Public Health Service Act, 42 U.S.C. § 256b. As a result, plaintiff contends, the putative class members "overpaid for prescription drugs by nearly $500 million per year," and perhaps as much as "$259 million per month," over a class period extending back twelve years, to 1992. Complaint ¶¶ 4, 50, 56.

Plaintiff argues that class certification would be proper under any of the provisions of Rule 23(b) (see Complaint ¶¶ 56-62), but clearly attempts to couch its claims as being principally equitable in nature, and therefore readily certifiable under Rule 23(b)(2). Specifically, the complaint focuses on plaintiff's requests for an equitable accounting of defendants' pricing practices under the federal drug program and for an injunction against continued overcharging. See *id.*, ¶¶ 63-69; Demand for Relief ¶¶ A-B. Although plaintiff also asserts

claims for breach of contract and for unjust enrichment (itself an equitable claim) (see Complaint ¶¶ 70-77), plaintiff artfully avoids expressly requesting damages, asking instead only for "such other and further relief as the Court may deem just" (Demand for Relief ¶ D). Even so, the inclusion of the unjust enrichment claim leaves no doubt that plaintiff seeks to recover the amount by which the putative class allegedly was overcharged during the twelve-year class period, which the complaint indicates could total billions of dollars. Indeed, the complaint elsewhere asserts that "[t]his case is uniquely situated to class action treatment as both liability ***and damages*** flow from the amount charged in excess of a ceiling price, which can be calculated on a formulaic basis." Complaint ¶ 60 (emphasis added).

It is hard to conceive of how it credibly could be argued that a suit seeking to recover several billion dollars for ***past*** overcharges is not one seeking predominantly money damages. The presentation of the claims in this complaint strongly suggests, however, that the plaintiff will try to do just that. What is more, that argument could well succeed under the approach endorsed by the Fifth Circuit in this case, given the allegation that the monetary damages sought can be "calculated on a formulaic basis." See Pet. App. 16a-19a.

2. *Carroll* v. *National Collegiate Athletic Ass'n*, No. CO4-1254C (W.D. Wash.) (filed May 19, 2004). Plaintiff alleges that the National Collegiate Athletic Association ("NCAA") violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, by entering an agreement with its Division I-A member schools to artificially restrain the number of football scholarships that each member can award. The complaint alleges that this unlawful agreement has enabled the NCAA and its co-conspirators to save "hundreds of millions in scholarship monies they would have paid in a market where free competition had been allowed to occur." Complaint ¶ 76.

Plaintiff demands damages on behalf of the class members — which, as noted, the complaint itself estimates could amount to hundreds of millions of dollars — and prays that those damages be trebled as permitted by federal law. See Complaint ¶ 11; Prayer For Relief ¶ D. Plaintiff also seeks a declaration that the NCAA's actions were unlawful and an injunction prospectively prohibiting further scholarship restrictions. See Complaint ¶¶ 11, 89, 96, 104; Prayer For Relief ¶¶ A, C. The complaint asserts that the proposed class thus properly can be certified under Rule 23(b)(2), as an alternative to the other provisions of Rule 23(b). See Complaint ¶ 19.

The class definition itself makes clear, however, that only a portion of the putative class could benefit from the injunctive relief sought. Specifically, plaintiff seeks to represent a class encompassing "all students who," during the four years preceding the filing of the complaint, "were on the football rosters of NCAA Division I-A schools, but who did not receive a full grant-in-aid from their school." Complaint ¶ 19. Obviously, a substantial number of students who played on Division I-A football teams within the last four years already will have graduated, meaning that they cannot benefit from the prospective change in the NCAA's scholarship rules that plaintiffs seek to obtain. But under the Fifth Circuit's approach, that would appear to be no impediment to certifying a class under Rule 23(b)(2).

3. *Buckley* v. *America Online, Inc.*, No. 3:02-cv-00918 (N.D. Cal.) (filed Feb. 22, 2002). Plaintiffs seek to represent, *inter alia*, a nationwide class of customers of defendant America Online, Inc. ("AOL"), to whom it is alleged AOL shipped unordered merchandise and then charged the customers' credit cards or electronic fund accounts for the products. See, *e.g.*, Complaint ¶¶ 1-2, 18, 34. Plaintiffs allege that AOL has failed to refund to the putative class members some or all of the money they were unknowingly charged or that they expended in returning the merchandise to AOL. *Id.*,

¶¶ 24-26. The complaint asserts that AOL's actions "render[] it liable for conversion, negligence, and money had and received, and constitutes unjust enrichment" (*id.*, ¶ 2), and requests an award of compensatory and punitive damages, pre-judgment and post-judgment interest, restitution of the wrongfully taken funds, and the imposition on AOL of a constructive trust for all monies taken from the putative class. See Prayer For Relief ¶¶ 2-3, 6-8. No injunctive relief is sought that would benefit the nationwide class as a whole, although plaintiffs do seek declaratory and injunctive relief on behalf of two proposed subclasses. See *id.*, ¶¶ 4-5. Despite the fact that the complaint on its face seeks only monetary relief for the proposed nationwide class, plaintiffs assert that the putative class may be certified, *inter alia*, under Rule 23(b)(2). See Complaint ¶ 34. As already noted, that outcome would be irreconcilable with the plain language of the Rule. Under the Fifth Circuit's approach, however, the fact that a subset of the class members might benefit from an injunctive remedy could suffice to certify the claims for class adjudication.

These examples illustrate the ease with which a request for injunctive relief from which some class members might benefit can be added to claims that, on their face, seek primarily monetary relief for the class as a whole. Under the panel majority's decision, that likely would suffice to certify such suits as (b)(2) class actions, thereby avoiding Rule 23(b)(3)'s safeguards of the cohesiveness and commonality of interest among class members seeking individual monetary relief. The absence of such safeguards from (b)(2) class actions already has prompted this Court to declare that there is a substantial possibility that suits seeking monetary relief may never be certified under Rule 23(b)(2). See *Ticor*, 511 U.S. at 121; *Ortiz*, 527 U.S. at 844-845 (citing *Ticor*). The manipulation of Rule 23(b)(2) by the panel majority in this case demonstrates not only that this Court's apprehensions are justified, but that the time has come to definitively re-

solve the question. Accordingly, the petition for a writ of certiorari should be granted.

II. THE FIFTH CIRCUIT'S DECISION INVITES DUE PROCESS VIOLATIONS

Review by this Court of the decision below is warranted for the additional reason that the analysis employed by the panel majority is rife with potential due process violations. This Court has emphasized that, in the quest to achieve the "efficiency" offered by the class-action device, federal courts "'shall not abridge, enlarge or modify any substantive right.'" *Amchem*, 521 U.S. at 613, 615 (quoting the Rules Enabling Act, 28 U.S.C. § 2072(b)); see also *Ortiz*, 527 U.S. at 845 (explaining that "no reading" of Rule 23 "can ignore the [Rules Enabling] Act's mandate that rules of procedure 'shall not abridge, enlarge or modify any substantive right'") (quoting 28 U.S.C. § 2072(b)) (some internal quotation marks omitted). What this means, as a practical matter, is that courts may not relieve plaintiffs in a class action of the burden of proving the individualized elements of their claims and may not deprive defendants of the right to put on individualized evidence, to raise individualized defenses, and to receive a verdict on the individualized facts of each class member's claims. See generally *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) ("'Due process requires that there be an opportunity to present every available defense.'") (quoting *American Sur. Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)); *United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971) (a defendant's "right to litigate the issues raised" is "a right guaranteed to him by the Due Process Clause"). The decision of the panel majority contravenes these due process principles in several ways.

To begin with, in opposing class certification, the defendants pointed out that individual trials would be required in order to determine whether any particular class member's "rates and policies were justified by valid insurance under-

writing and sound actuarial calculations," including "underwriting based on the insured's medical condition, income, job classification, job history, and other facts which have an impact on mortality risks and persistency (the likelihood of steady premium payments)." Pet. 7. For example, the premium charged to a morbidly obese individual who had a family history of heart disease, was a heavy smoker, and worked in a hazardous occupation could have been the same as or higher than the race-based premium charged to that individual. Of course, if a class member would have paid the same (or a higher) premium even if race-based factors were not employed by the insurer, the class member could not prove injury and hence could not state a valid claim.

The district court accepted this argument, ruling that "many and a variety of hearings would be required to determine personalized harm to each individual plaintiff because of the mass of policies involved, differing underwriting practices among some 280 companies, differing built in benefits, account dividends, and age at policy issuance." Pet. App. 55a. The panel majority did not reject the district court's finding, but instead treated "the idiosyncrasies" of each class member's personal situation as impacting only the calculation of the amount of each class member's damages, not whether the class member was entitled to any damages at all. Pet. App. 16a.

By thus glossing over the impact that individualized factors would have on the prosecution of the claims of the members of the putative class, the panel majority endorsed an approach by which the defendants in this action likely will be "forced to defend against a fictional composite without the benefit of deposing or cross-examining the disparate individuals behind the composite creation." *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998). Because the Fifth Circuit's approach necessarily lightens the plaintiffs' burden of proving the "injury" element of each class member's claim, it cannot be reconciled with

this Court's admonition that the class-action device may not be used to alter substantive rights. As the Fourth Circuit has explained: "[C]ourts considering class certification must rigorously apply the requirements of Rule 23 to avoid the real risk, realized here, of a composite case being much stronger than any plaintiff's individual action would be." *Ibid.*

Indeed, the Fifth Circuit's subordination of the defendant's right to insist on individualized adjudication of individualized issues to what it deemed to be the broader social benefit of class-wide adjudication puts it in square conflict with the Texas Supreme Court. Consistent with this Court's due process precedents, that court reversed the certification of a personal injury class action arising out of a refinery tank fire, explaining that the defendant was "entitled to a fair opportunity to individual determinations of causation and damages for each of the 904 plaintiffs" and that this encompassed a right "to challenge the credibility of and its responsibility for each personal injury claim individually." *Southwestern Ref. Co.* v. *Bernal*, 22 S.W.3d 425, 437 (Tex. 2000). Because the contours of the federal due process clause should not vary based on whether a case is filed in state court rather than federal court, review is necessary to resolve the conflict between the Fifth Circuit and the Texas Supreme Court on this important issue.

Equally troubling from a constitutional standpoint is the panel majority's conclusion that individual limitations issues did not have to be factored into the class certification analysis. Specifically, the panel majority held that, for class certification purposes, the district court should presume that the class lacked knowledge of the defendants' alleged unlawful conduct. Pet. App. 20a n.22 ("Here, accrual of the statute of limitations is premised on defendants' common practice of concealment, so a presumption of unawareness by the plaintiff class is warranted."); see also *id.* at 19a ("Doubtless most class members, the majority of whom are poor and unedu-

cated, remain unaware of defendants' discriminatory practices.").

The majority justified this unprecedented approach on the ground that treating the limitations question as an individualized issue "would foreclose use of the class action device for a broad subset of claims, a result inconsistent with the efficiency aims of rule 23." Pet. App. 20a. In so reasoning, the majority was looking through the wrong end of the telescope. It is not the function of the courts to create rules that maximize the availability of the class-action device. As this Court admonished in *Amchem*, "the rulemakers' prescriptions for class actions may be endangered by 'those who embrace [Rule 23] too enthusiastically just as [they are by] those who approach [the Rule] with distaste.'" 521 U.S. at 629 (quoting C. Wright, Law of Federal Courts 508 (5th ed. 1994)).

The upshot of removing limitations issues from the class certification process is to treat "knowledge" and "constructive notice" as class-wide issues. Pet. App. 19a, 20a. That one-size-fits-all approach cannot be reconciled with the fundamental constitutional principle that "'[d]ue process requires that there be an opportunity to present every available defense.'" *Lindsey*, 405 U.S. at 66 (quoting *American Sur. Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)). See also, *e.g.*, *Western Elec. Co.* v. *Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976) ("[T]o deny [the defendant] the right to present a full defense on the issues would violate due process."). In the context of a class action, the right to present "every available defense" means the right to take individualized discovery and to put on individualized evidence to establish individualized defenses, including the statute-of-limitations defense.[3]

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[3] See, *e.g.*, *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 425 (E.D. La. 1997) (refusing to certify nationwide class of consumers claiming to have received defective siding products because, among other things, "it is apparent that

The all-or-nothing approach necessitated by the majority's ruling also threatens to violate the due process rights of absent class members. Under the majority's approach, there will be a single statute-of-limitations determination (or perhaps one per state) that will be binding on both defendants and the class members. Yet given the panel's suggestion that the notice provided to this (b)(2) class need not be as stringent as the notice provided in a (b)(3) case (Pet. App. 13a n.13), there is virtually no chance that absent class members will receive fair and adequate notice that their claims might be forever forfeited as a result of a statute-of-limitations determination made on the basis of someone else's knowledge. Moreover, the panel was equivocal at best as to whether the right to opt out may be afforded in a (b)(2) class action. *Id.* at 13a & n.15. Hence, even class members who are aware of the risks of the all-or-nothing approach established by the panel majority may not be able to do anything about it.

Indeed, the panel majority's treatment of the statute-of-limitations issue well illustrates the error in its assumption that a suit seeking substantial money damages on behalf of millions of people can be certified as a (b)(2) class action and bind absent class members based solely upon the kind of limited notice that traditionally has sufficed for true (b)(2) class

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[defendant] cannot receive a fair trial without a process which permits a thorough and discrete presentation of [its individualized] defenses"); *Lusardi* v. *Xerox Corp.*, 118 F.R.D. 351, 370 (D.N.J. 1987) (decertifying age discrimination class action and noting that "[t]o proceed without permitting Xerox to raise at the liability stage of trial each and every defense available to it where each potential class member is readily identifiable and must step forward in order to assert and prove an individual claim for liability or at least be the subject of a defense particular to each such plaintiff would deprive defendant of the Fifth Amendment right to due process"), mandamus granted on other issues, 855 F.2d 1062 (3d Cir. 1988).

actions. The drafters of Rule 23 afforded mandatory notice and opt-out rights solely to the members of a (b)(3) class in recognition of the fact that class actions certified under that provision could conflict with "the interests of the individuals in pursuing their own litigations." Rule 23(c)(2), Advisory Committee Note; see also *Amchem*, 521 U.S. at 615 (observing that the drafters of Rule 23(b)(3) were "[s]ensitive to the competing tugs of individual autonomy for those who might prefer to go it alone or in a smaller unit, on the one hand, and systemic efficiency on the other"). By contrast, as discussed above, a (b)(2) class is assumed to be a homogeneous and cohesive group with few, if any, conflicting interests among its members. There is no cohesiveness to the (b)(2) class, however, when, as here, an absent class member's right to recover money damages could forever be barred on the basis of a defense that would not be successful against that plaintiff if he or she had pursued an individual claim. Because this Court has held that an absent class member's right of action for money damages cannot be extinguished unless the class member first receives notice plus the opportunity to opt-out (see *Ortiz*, 527 U.S. at 847-848 (discussing the Court's holding in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811-812 (1985)), it follows that the procedure typically utilized in true (b)(2) cases — limited notice and no right to opt out — would violate due process in this case.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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